In the Supreme Court of the United States

OCTOBER TERM, 1924

C. O. LINDER, PETITIONER
v.
THE UNITED STATES
No. 183

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

STATEMENT

This case is before the court on a writ of certiorari granted at the October, 1923, Term, to review a judgment of the United States Circuit Court of Appeals, affirming the conviction of petitioner in the United States District Court for the Eastern District of Washington. The indictment was founded upon the so-called Harrison Narcotic Act of December 17, 1914, 38 Stat. 785, as amended February 24, 1919, 40 Stat. 1130.

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ARGUMENT

I

The writ of certiorari in this case should be dismissed on the ground that it was improvidently granted

The sole question now presented by petitioner is whether the indictment here involved states an offense which Congress had the constitutional power to create. Neither in the trial court nor in the Circuit Court of Appeals did petitioner in anywise assail the validity of the indictment. He appears to have reserved that point of attack for utilization in securing a review of the case by this court. It was his duty to have raised the alleged constitutional issue in the trial court, and in the event of an adverse ruling, availed of the statutory right to bring the case here for review on writ of error under Section 238 of the Judicial Code. This court has recently been insisting upon adherence to the orderly and established procedure of review, and no facts or circumstances now presented require that this case be made exceptional. *Ex parte Riddle,* 255 U. S. 450, 451; *idem.* 262 U. S. 333, 335; *Goto* v. *Lane,* 265 U. S. 393, 401; *Pickett* v. *United States,* 216 U. S. 456, 462.

As said by this court in *Magnum* v. *Coty,* 262 U. S. 159, 163, in speaking of its authority to issue certiorari, "the jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing." See also *Lutcher & Moore Lumber Co.* v. *Knight,*

217 U. S. 257, 267–268; *Southern Power Co.* v. *Public Service Co.*, 263 U. S. 508, 509; *Grant Bros.* v. *United States*, 232 U. S. 647, 661.

II

On the merits

Should the court determine that the writ of certiorari granted in this case, should not be dismissed, then it is respectfully submitted that the judgment below should be affirmed for the following reasons:

1. Petitioner contends in substance that if the indictment and the statute upon which it is founded, be construed as charging the administration of drugs merely to gratify the appetite of an addict, such an offense is beyond the power of Congress to create (brief petitioner pp. 11, 12, 25).

This is precisely what the indictment and the statute cover, and what this court intended to uphold in *United States* v. *Behrman*, 258 U. S. 280, 287, 288, as shown by the following excerpt from the opinion in that case (p. 289):

> But the quantities named in the indictment are charged to have been entrusted to a person known by the physician to be an addict without restraint upon him in its administration or disposition by anything more than his own weakened and perverted will. Such so-called prescriptions could only result in the gratification of a diseased appetite for these pernicious drugs or result in an unlawful parting with them to others in violation of the act as heretofore interpreted in

this court within the principles laid down in the *Webb* and *Jin Fuey Moy Cases, supra.*

The indictment in the case at bar is framed in the same language as the indictment in the above-mentioned *Behrman case,* except for the amount of the drug alleged to have been sold or distributed otherwise than in the course of professional practice. No distinction, however, can be made between the two cases on the ground merely of the difference between the amounts of drugs which are charged in the two indictments. In the *Behrman case, supra,* this court had before it only the strict allegations of the indictment, and for that purpose the amount of the drug becomes immaterial in determining whether the indictment actually and sufficiently charges it to have been unlawfully sold or distributed.

It necessarily follows, therefore, that under the *Behrman case, supra,* the indictment in the case at bar states an offense within the power of Congress to punish.

2. Moreover, the case on the record shows a plain purpose on the part of petitioner not to treat the addict in a purely professional way but merely for a money consideration, to make it possible for the addict to obtain the drug solely for the gratification of his addiction.

The judgment below is also supported by *Hobart* v. *United States,* 299 Fed. 784, wherein the court said:

> The case of *United States* v. *Behrman,* 258 U. S. 280, 288, 42 Sup. Ct. 303, 66 L. Ed. 619, destroys the theory of the defense upon the present trial. Since that decision there is no possibility that conduct such as Hobart admitted could be lawful. The patient was not under restraint. Hobart furnished to him, at frequent intervals and for self-administration, large quantities of morphine, though in quantities diminishing from one time to another; but the patient was at liberty to apply to other doctors and get as many other similar prescriptions as he could.

So in the case at bar the addict was under no restraint and was at liberty to apply to other physicians for so-called prescriptions. This she probably did.

See also *Simmons* v. *United States,* 300 Fed. 321, 322.

3. Petitioner also contends that the indictment is capable of the construction, in substance, of charging that the drug was given in the professional treatment of addiction. The *Behrman case, supra,* must be held to dispose adversely of such claim, for if the indictment there, of which the indictment at bar is a duplicate in allegation, had been capable of such construction, this court would have said so. Of course, the indictment must be taken by its four corners when undertaking to determine what it actually alleges. It is not permissible to dissect it, and base an attack upon a single excerpted phrase. The indictment here, like that

in the Behrman case, supra, when construed as a whole, plainly charges an unlawful distribution of the drug.

III

It is respectfully submitted that the writ granted in this case should be dismissed as improvidently granted, or in the alternative the judgment below affirmed.

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FEBRUARY, 1925.

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